



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-06-2

INTRODUCTION

This opinion reviews two forms of councils of governments that were created following the dissolution of certain county governments in the late 1990's. The Commission has been asked to review *EC-COI-99-5*, in which it concluded that the Hampshire Council of Governments is a "municipal agency" for purposes of the conflict of interest law, in light of legislation enacted following the issuance of that opinion. In addition, we have been asked to consider the Franklin Regional Council of Governments, also in light of that legislation.

QUESTIONS

1. Is the Hampshire Council of Governments a "county agency" for purposes of G. L. c. 268A?
2. Is the Hampshire Council of Governments a "governmental body" as defined in G. L. c. 268B?
3. Is the Franklin Regional Council of Governments a "county agency" for the purposes of G. L. c. 268A?

ANSWERS

1. Yes.
2. Yes.
3. No. The Franklin Regional Council of Governments is a "municipal agency" for purposes of G. L. c. 268A.

FACTS

Hampshire Council of Governments

Pursuant to St. 1998, c. 300, § 45 (the 1998 Act),¹ Hampshire County government was dissolved, and, as a result, the Hampshire Council of Governments was created. Some functions that the former Hampshire County performed were transferred to the Commonwealth, and others to the Hampshire Council of Governments.

The Commission, in *EC-COI-99-5*, considered, for the first time, the jurisdictional issue of regional councils of governments. After analyzing the 1998 Act, the Commission concluded that, for purposes of the conflict of interest law, the Hampshire Council of Governments (Hampshire Council) was a "municipal agency" of each of its member municipalities, primarily because it is controlled by, and serves the municipal level of government. As a result, the

Commission concluded, consistent with Commission precedent,² that every member of the Hampshire Council and all Hampshire Council employees were municipal employees of each of the member municipalities.

Following the release of *EC-COI-99-5* in 1999, the Legislature enacted G. L. c. 34B. Chapter 34B, which reiterates much of the 1998 Act, concerns the “Abolition of County Government.”³ Chapter 34B defines “abolished county” to include the former counties of: Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire.⁴ For example, c. 34B covers the transfer of duties to the Commonwealth, the status of abolished counties’ liabilities and assets, the status of the county sheriffs and the retirement systems, and the creation of regional charter commissions and regional councils of governments.

Franklin Regional Council of Governments

The Franklin Regional Council of Governments (Franklin Council) was created as a result of the dissolution of Franklin County government pursuant to St. 1996, c. 151, § 567.⁵ It was established within the geographical boundaries of former Franklin County and succeeded to “any and all regional planning activities or functions”⁶ that Franklin County had under several prior laws.⁷

There was a transition period during which the former Franklin County Commissioners served the balances of their current terms but functioned as the Franklin Council of Governments Committee. This Committee continues to serve as the Chief Executive Officer of the Franklin Council, and has the powers of selectmen pursuant to G. L. c. 41, §§ 52 and 56.⁸ Two members of the Committee are chosen by the voters of the (former) Franklin County at the state election. As former County Commissioners completed their terms, new members of the Committee are chosen to represent each of the municipalities, one from each city or town.⁹ In addition, a Franklin Regional Advisory Board, consisting of a member of the board of selectmen of each town, was created to serve as the legislative and appropriating authority for the Franklin Council.¹⁰

“Any political subdivision of the commonwealth may enter into agreement with the Franklin Council of Governments to perform jointly or for the other, in cooperation with other entities, any service, activity or undertaking which such political subdivision is authorized by law to perform.”¹¹ The Franklin Council may impose a regional assessment, allocated among the Franklin Council members. The regional assessment is based on the Council’s budget. “The regional assessment shall be retained by the [Council] and shall be used solely for the purpose of providing regional or municipal services or both.”¹²

G. L. c. 34B

As noted above, the Franklin Council was created by a separate special act, approximately two years before the dissolution of Hampshire County, and the ensuing creation of the Hampshire Council. Each of the “abolished” counties as specified in G. L. c. 34B (Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire) was dissolved *after* Franklin County government.

Although the former Franklin County is mentioned twice in c. 34B, the Legislature distinguished the former Franklin County from these other former or “abolished” counties.¹³ For example, “All persons employed by the former Franklin County *or by an abolished county*, or by Hampshire county as of September 1, 1998, whose work functions primarily concern the operation and maintenance of said county’s court facilities shall be transferred to the commonwealth under the administrative office of the trial court as of the effective date of the transfer, which in the case of Hampshire county shall be September 1, 1998.”¹⁴ Further, in § 12, Franklin is distinguished from the others. “[T]he sheriff of an abolished county, including Franklin county, in office immediately before the transfer date, and, in Hampshire county, on September 1, 1998 shall become an employee of the commonwealth with salary to be paid by the commonwealth.”

Other than as described above, the former Franklin County is not mentioned in c. 34B. In particular, c. 34B, § 20, entitled, “Cities and towns; regional charter commissions; regional councils of government,” begins by describing how a municipality “within or contiguous to an abolished county or to be abolished county” may join a regional charter commission. Section 20 goes on to describe how a “regional council of government established *pursuant to this section* may administer and provide regional services to cities and towns.”¹⁵

Finally, § 20(l) of c. 34B states, “The provisions of chapter 268A and 268B that are applicable to a county agency and county employees shall apply to a regional council of government and its employees.”¹⁶

DISCUSSION

Were we only to compare the Franklin Council with the Hampshire Council, which was analyzed in *EC-COI-99-5*, then our opinion would be brief. The attributes of the Franklin Council are sufficiently similar to those of the Hampshire Council, notwithstanding the fact that each governmental body was created pursuant to different enabling legislation, that we would conclude that the Franklin Council is a regional municipal agency for purposes of the conflict of interest law. However, we must also consider the effect of G. L. c. 34B, § 20(l) on our analysis of both the Hampshire and Franklin Councils.

The Hampshire Council

The plain language of G. L. c. 34B, § 20(l) contradicts the Commission’s conclusion in *EC-COI-99-5* that the Hampshire Council is a municipal agency. Given that Chapter 34B, and, more specifically, § 20 applies to the Hampshire Council, there is little doubt that the Legislature intended § 20(l) to apply to the Hampshire Council. Thus, notwithstanding that “county” government in Hampshire no longer exists for purposes of *most* General Laws, the Legislature has intended, through the plain language of G. L. c. 34B § 20(l), that the “county” provisions in G. L. c. 268A apply to the Hampshire Council and its employees.¹⁷

Further, the plain language of c. 34B shows a clear legislative intent to apply G. L. c. 268B also to the Hampshire Council, thereby imposing the requirement on certain Hampshire Council personnel to file Statements of Financial Interests (SFI). Under G. L. c. 268B, § 5, candidates for “public office,”¹⁸ “public officials,”¹⁹ and “public employees”²⁰ must file SFI’s. For example, a “public employee,” means “any person who holds a *major policymaking position*”²¹ in a *governmental body*.”²² “Governmental body” as defined in G. L. c. 268B, §

1(h) “means any state or county agency, authority, board, bureau, commission, council, department, division, or other entity”²³

Thus, any Hampshire Council employee who is a “public employee” as defined in c. 268B must “file a statement of financial interests for the preceding calendar year with the commission within thirty days after becoming a public employee, on or before May first of each year thereafter that such person is a public employee.”²⁴

The Franklin Council

We next consider whether the Franklin Council is a state, county, or municipal agency under c. 268A and the application of c. 34B to the former Franklin County. As discussed below, we conclude that the Franklin Council is a regional “municipal agency,” not a “county agency,” for purposes of G. L. c. 268A.

We can assume that the Legislature is aware of prior statutes when it enacts a new provision relating to the same subject matter²⁵ and that it acted rationally.²⁶ Here, when the Legislature enacted G. L. c. 34B, it was obviously aware of the fact that it had passed legislation abolishing Franklin County and establishing the Franklin Council.²⁷ The two specific references to Franklin within c. 34B make that clear. It is also obvious that when the Legislature intended to treat the various former counties differently, it explicitly so stated. For example, in G. L. c. 34B, § 1, Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire are defined, for purposes of c. 34B, as “abolished counties” and each has different “transfer dates” as defined in the section. Chapter 34B does not indicate that the Legislature considered Franklin to be an “abolished county” as defined in that chapter.

General Laws Chapter 34B, § 20, entitled “Cities and towns; regional charter commissions; regional councils of government,” introduces the phrase “regional councils of government.” This phrase is not defined anywhere in § 20 or in any other section of c. 34B. However, we can determine its meaning from all the subsections within the main section.²⁸

This section sets forth the steps to create regional councils of government and their powers. Section 20(a) states that municipalities “within or contiguous to an abolished county or to be abolished county” may create a “regional council of government.” We note that in § 20 the Legislature again uses the term, “abolished county,” which, as explained above, does not include Franklin County, but, rather, refers only to the counties identified in c. 34B, § 1.

Thus, the phrases “regional council of government” or “council of government” have meanings within, and defined by, § 20 of c. 34B, rather than by some other law. It must have been clear to the Legislature that the Franklin Council was not created pursuant to § 20 because the creation of Franklin Council predated § 20 by approximately two years.

Notably, when the Legislature intended to apply § 20 to a council of governments that had been created prior to the enactment of § 20, it made that clear. Section 20(b) states, “Notwithstanding subsection (a), the following provisions shall apply to Hampshire county.” This subsection goes on to ratify, validate, and confirm all actions that the Hampshire Council took prior to July 1, 1999, which effectively applies all of § 20’s provisions to the Hampshire Council.

There is no counterpart subsection in § 20 that ratifies, validates, and confirms the actions of the Franklin Council.

Again, we must assume that the Legislature had a reason to expressly include Hampshire within the § 20(b) ratification language but not include Franklin. “It is a familiar principle of statutory interpretation that express mention of one matter excludes other similar matters not mentioned.”²⁹ Although the phrase “regional council of government” in § 20 has a generic quality, we take “its meaning from the setting in which it is employed.”³⁰

Accordingly, when we read § 20(l), “The provisions of chapter 268A and 268B that are applicable to a county agency and county employees shall apply to a regional council of government and its employees,” we conclude that “regional council of government” refers to a regional council of government established pursuant to § 20, rather than to all regional councils of government however established. Section 20 is expressly made applicable to the Hampshire Council, which was in existence at the time of § 20’s enactment, but § 20 is not expressly made applicable to the Franklin Council, which was also in existence at the same time. Thus, we narrowly read this subsection to refer to the subject matter covered by the full section.

If the Legislature intended to treat the Franklin Council the same as the Hampshire Council, it could have explicitly done so. We are guided by rules of statutory interpretation that we cannot add words that the Legislature did not include “either by inadvertent omission or by design.”³¹ Further, the phrase “regional council of government” is in close association with the Hampshire Council.³² Considering all of these circumstances, we conclude that G. L. c. 34B, § 20(l) does not make the Franklin Council a “county agency” for purposes of G. L. cc. 268A and 268B.

As in *EC-COI-99-5*, in absence of “county” government, we are left with two alternatives under c. 268A. The Franklin Council must either be a “state agency” or a “municipal agency.” Based on our analysis in *EC-COI-99-5*, we conclude that the Franklin Council is a “municipal agency”, and members or employees of the Franklin Council are “municipal employees” as defined in G. L. c. 268A. The Franklin Council serves the municipal level of government and is ultimately accountable to the municipalities, rather than to state employees and/or state agencies.³³

DATE AUTHORIZED: May 11, 2006

¹ The 1998 Act is entitled, “AN ACT ABOLISHING THE COUNTY GOVERNMENTS OF HAMPSHIRE, ESSEX, AND BERKSHIRE COUNTIES, AND TRANSFERRING ESSENTIAL COUNTY FUNCTIONS TO THE COMMONWEALTH.”

² See e.g., *EC-COI-94-9*; *EC-COI-92-40*; *EC-COI-92-27*; *EC-COI-92-26*.

³ As inserted by St. 1999, c. 127, § 53. Chapter 127 of the Acts of 1999 is “An Act Making Appropriations for the Fiscal Year 2000”

⁴ G. L. c. 34B, § 1.

⁵ Entitled, “AN ACT RELATIVE TO THE REORGANIZATION OF FRANKLIN COUNTY.”

⁶ St. 1996, c. 151, § 567(R).

⁷ St. 1963, c. 425; G. L. c. 40B, §§ 5, 5A, 5B, and 14.

⁸ St. 1996, c. 151, § 567(H) (G. L. c. 41, §§ 52 and 56 concern the approval of payment bills or pay rolls and the warrants for bills).

⁹ *Id.*

¹⁰ St. 1996, c. 151, § 567(S).

¹¹ St. 1996, c. 151, § 567(U).

¹² *Id.* at § 567(V).

¹³ *See e.g.*, G. L. c. 34B, § 4, 12.

¹⁴ G. L. c. 34B, § 4.

¹⁵ *Id.*, § 20(g) (*emphasis added*).

¹⁶ *Id.*, § 20(l).

¹⁷ It is also notable that G. L. c. 34B was inserted into the General Laws under St. 1999, c. 127, § 53. Chapter 127 of the Acts of 1999 is the state budget for Fiscal Year 2000. Section 53 was a rider added to the state budget. Chapter 127 was approved by the Governor on November 16, 1999. On September 15, 1999, the Ethics Commission authorized *EC-CO/99-5* and issued that opinion shortly thereafter. Thus, soon after the Ethics Commission's public statement that the Hampshire Council is a "municipal agency" under c. 268A, the Legislature enacted G. L. c. 34B, § 20(l), which expressly makes a regional council of government a "county agency" for purposes of G. L. cc. 268A and 268B.

¹⁸ "Public office means any position for which one is nominated a state primary or chosen at a state election" G. L. c. 268B, § 1(p).

¹⁹ "Public official means anyone who holds a public office, as defined by clause (p) of [§ 1]." *Id.*, § 1(q).

²⁰ "Public employee means any person who hold a major policymaking position in a governmental body; provided, however, that any person who receives no compensation other than reimbursements for expenses, or any person serving on a governmental body that has no authority to expend public funds other than to approve reimbursements for expenses shall not be considered a public employee for the purposes of [G. L. c. 268B]." *Id.*, § 1(o).

²¹ "Major policy making position means: the executive or administrative head or heads of a governmental body . . . any person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in section forty-six of chapter thirty and who reports directly to said executive or administrative head; the head of each division, bureau, or other major administrative unit within such governmental body; and persons exercising similar authority." *Id.*, § 1(l).

²² *Emphasis added.*

²³ *Emphasis added.*

²⁴ G. L. c. 268B, § 5(c) (*emphasis added*). “However, . . . no public employee shall be required to file a statement of financial interests for the year in which he ceased to be a public employee if he served less than thirty days in such year.” *Id.* Further, we note, that any regional council of government that is established pursuant to G. L. c. 34B, § 20, which includes “abolished counties” as defined in G. L. c. 34B, § 1 (Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire), is also subject to G. L. c. 268A and c. 268B, as a result of G. L. c. 34B, § 20(l).

²⁵ *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 554 (1996); Singer, *Sutherland Statutory Construction*, § 51.02 (p. 176) (6th ed. 2002).

²⁶ *In the Matter of the Liquidation of American Mutual Liability Ins. Co.*, 440 Mass. 796, 803 (2004); *Selectmen of Topsfield v. State Racing Commission*, 324 Mass. 309, 313 (1949).

²⁷ The Legislature must have known, in enacting c. 34B in 1999, not only that Franklin County had been dissolved as of 1996-1997, but also that the Franklin Council had been established well before it considered, in 1999, the legislation that became c. 34B.

²⁸ For example, it is significant that § 20(g) specifies, “a regional council of government established pursuant to this section may administer and provide regional services to cities and towns and may delegate such authority to subregional groups of such cities and towns. Regional councils of government may enter into cooperative agreements with regional planning commissions or may merge with such commissions to provide regional services.” (*emphasis added*). Thus, we interpret the phrase “pursuant to this section” to refer to all of § 20 because § 20(g) only confers certain powers to a council of governments. *Acting Superintendent of Bournemouth Hospital v. Baker*, 431 Mass. 101, 104-105 (2000).

²⁹ *Spence, Bryson, Inc. v. China Products Co.*, 308 Mass. 539, 542 (1960).

³⁰ *Quincy City Hospital v. Rate Setting Commission*, 406 Mass. 431, 443 (1990).

³¹ *Fafard v. Lincoln Pharmacy of Milford, Inc.*, 439 Mass. 512, 515 (2003). See also *Dube v. Contributory Retirement Appeal Board*, 50 Mass. App. Ct. 21, 24 (2000) (“we will not add to a statute a word that the Legislature had the option to, but chose not to include”).

³² *First Eastern Bank, N.A. v. Jones*, 413 Mass. 654, 660-661 (1992) (the term “trustee” is most closely with probate law in the context of G. L. c. 203, § 14A, thus § 14A does not include trustees of a Massachusetts business trust) (“The literal meaning of a general term in an enactment must be limited so as not to include matters that, although within the letter of the enactment, do not fairly come within its spirit and intent.” *Kenney v. Building Comm’r of Melrose*, 315 Mass. 291, 295 (1943), quoted in *First Eastern Bank*).

³³ EC-COI-03-4.